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No. 01-961

Supreme Court, U.S.
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In The
Supreme Court of the United States

ELECTRIC MOTOR & SUPPLY, INCORPORATED, RALPH FORCE and CHARLES M. RHODES,

Petitioners,

v.

POTOMAC ELECTRIC POWER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Petitioners file this Reply to the Brief in Opposition filed by Respondent, Potomac Electric Power Company ("PEPCO"), in response to the Petition for a Writ of Certiorari filed by petitioners, Electric Motor & Supply, Incorporated ("EMS"); Ralph Force; and Charles Rhodes. In that petition, petitioners requested this Court to review the August 10, 2001, decision of a three-judge panel of the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit"), which entered an order affirming the ruling of the United States District Court for the District of Maryland at Baltimore (the "District Court"). The petition demonstrated that the Fourth Circuit's continued rejection of the "investment injury rule" conflicts with the law in seven circuit courts of appeal. Petitioners also showed that resolution of the issues presented by this case would resolve a second split in the circuit courts on the proper interpretation of the Racketeer-Influenced and Corrupt Organizations Act.

In its Brief in Opposition, respondent, PEPCO, presented no substantive reasons why this Court should not grant certiorari in this case. Instead, PEPCO claims only that certiorari should be denied because, according to it, "no final judgment exists upon which Petitioners might legitimately base their request for certioriari." (Brief in Opposition, at 4-5.) Respondent's position has no merit. There is no final judgment requirement, under 28 U.S.C. § 1254 or elsewhere, for issuance of a writ of certiorari. "[T]here is no requirement that there be a 'final' decision; once a case has come to be in a court of appeals, the Supreme Court may grant certiorari to review interlocutory decisions or procedural rulings, and may even grant review before the court of appeals has taken any action at all." 17 C. Wright, A. Miller, & E. Cooper, Federal

Practice & Procedure: Jurisdiction 2d § 4036, at 10-11 (West Publishing Co. 1988)(hereinafter, "17 Wright & Miller"). "The basic requirement is that the jurisdiction of the court of appeals [was] properly invoked under the general statutory provisions for reviewing a district court" decision in the first instance, as it was in this case. 17 Wright & Miller, at 11.

"The ... question is whether the ... order of the District Court was an appealable order and whether this case was properly 'in' the Court of Appeals when the petition for certiorari was filed in this Court. ... Since the appeal was timely filed and all other procedural requirements were met, the petition is properly before this Court for consideration if the District Court order was final" so as to be appealable to the court of appeals under 28 U.S.C. § 1291. U.S. v. Nixon, 418 U.S. 683, 690 (1974); also see 17 Wright & Miller, at 11, n. 6.

> Once a case has come to be in the court of appeals, there is power to issue certiorari without any limitation akin to the much elaborated and significantly reduced requirement of finality imposed on review of state court judgments. Certiorari may be granted to review decisions that do not dispose of the pending litigation, to examine orders that go merely to procedural steps before the court of appeals, or to decide a case that has not even been considered by the court of appeals.

17 Wright & Miller, at 19.

The basis for this rule is "the Court's ability, as head of a single judicial system, to control the procedure, choice of issues for decision, and final disposition of federal cases... ." Ibid. Consistent with this rationale, "it is clear that issuance of the court of appeals mandate does not defeat the right to petition for certiorari on the ground that the case is no longer in the court of appeals." 17 Wright & Miller, at 19. See, e.g., Aetna Casualty & Sur. Co. v. Flowers, 330 U.S. 464, 467 (1947). See also United States v. Perez, 110 F.3d 265 (5th Cir. 1997). In Perez, the court of appeals mandate issued March 4 and the district court, in compliance with the mandate, dismissed the indictment March 6. On June 3, the government petitioned for certiorari. 110 F.3d at 266. The Perez court cited 17 Wright & Miller, § 4036, among other authority, in noting that "[t]he Supreme Court does not lose jurisdiction because the mandate of the Supreme Court has issued." 110 F.3d at 266, n. 4.

Accordingly, far from being "inappropriate," as respondent claims in its opposition to the petition for a writ, the petition for a writ of certiorari in this case, filed after reversal and remand by the Fourth Circuit, is well-founded and supported by ample precedent. "In a wide range of cases, certiorari has been granted after a court of appeals has disposed of an appeal from a final judgment on terms that require further action in the district court, so that there is no longer any final judgment." 17 Wright & Miller, at 29-30. See, e.g., School Bd. of Nassau Cty., Fla. v. Arline, 480 U.S. 273, rehearing denied, 481 U.S. 1024 (1987), on remand, 692 F.Supp. 1286 M.D. Fla. (1988)(court of appeals reversed dismissal and remanded for further proceedings); California Brewers Ass'n v. Bryant, 444 U.S. 598, rehearing denied, 445 U.S. 973 (1980)(order reversing dismissal and remanding for further proceedings);

Butz v. Economou, 438 U.S. 478 (1978), on remand, 466 F.Supp. 1351 (S.D.N.Y. 1979), affirmed, 633 F.2d 203 (2d Cir. 1980)(the court of appeals had reversed a dismissal based on absolute official immunity, and remanded for further proceedings.); United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977)(the Fourth Circuit had reversed a summary judgment for the defendant and remanded for further proceedings); Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977)(the court of appeals had reversed a grant of summary judgment); Blackledge v. Allison, 431 U.S. 63 (1977) (the court of appeals had reversed dismissal of a petition for habeas corpus, and ordered an evidentiary hearing).

"Review is granted or denied according to a wide range of concerns, some of which bear on the finality of the disposition below, and many of which do not." 17 Wright & Miller, at 32. "Once review has been granted, moreover, the scope of the matters open for decision is approached entirely as a matter of wise judicial administration within a single system of courts; there is no need to wrestle with the problems of defining the appropriate deference to be paid to a separate, if subordinate, sovereign." Id. at 11.

As the procedural history set forth in the petition shows, plaintiff-appellant, PEPCO, appealed from a final judgment of the District Court (the District Court's grant of summary judgment in favor of defendants) and defendants-appellees timely cross-appealed. The case and the matters raised in the petition were unquestionably "in" the court of appeals within the meaning of the 28 U.S.C. § 1254. The Fourth Circuit's reversal and remand for further proceedings therefore does not bar the issuance of a writ of certiorari by this Court.

For the foregoing reasons, and those set forth in the petition, petitioners respectfully request that this Court exercise its discretionary authority and grant their petition for a writ of certiorari to the United States Court of Appeals to the Fourth Circuit.

Respectfully submitted,

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